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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1924

JAMES R. MUNIZ AND BROTHERHOOD OF TEAMSTERS AND AUTO TRUCK DRIVERS LOCAL NO. 70, IBTCHWA, PETITIONERS

v.

ROY O. HOFFMAN, DIRECTOR, REGION 20, NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. i–xvi)[1] is reported at 492 F. 2d 929. The district court's Order and Adjudication in Criminal Contempt (Resp. App. C, 23a–25a), Findings of Fact and Conclusions of Law Re: Criminal Contempt Proceedings (Resp. App. D, 26a–40a), and Judgment Imposing

[1] "Pet. App." refers to the appendix to the petition, "Resp. App." to the appendix to respondent's memorandum in response to the petition, and "A." to the parties' joint appendix in the Court.

Fines and Penalties in Re: Criminal Contempt (Resp. App. E, 41a–48a) have not been reported.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1974, and amended on March 7, 1974. Petitions for rehearing and rehearing *en banc* were denied on March 26, 1974 (Pet. App. xvii–xviii). The petition for a writ of certiorari was filed on June 24, 1974, and was granted on November 11, 1974, limited to the two questions restated below (A. 53–54).[2] The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant statutory and constitutional provisions are set forth in the Appendix hereto, *infra*. pp. 55–56.60

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 3692[3] requires a jury trial in a proceeding to adjudge a union and its officers in criminal contempt for having violated injunctions issued by the district court pursuant to section 10(*l*) of the National Labor Relations Act.

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[2] On November 11, 1974, the Court also denied the petition in No. 73–1813, *International Longshoremen's and Warehousemen's Union, Local No. 10* v. *Hoffman*, which sought review of other aspects of the decision of the court of appeals.

[3] 18 U.S.C. 3692 provides: "In all cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed."

2. Whether a jury trial was constitutionally required where a $10,000 fine was imposed on the union for criminal contempt.

STATEMENT

A. THE INJUNCTION ORDERS OF FEBRUARY 13 AND APRIL 28, 1970

California Newspapers, Inc., doing business as the Independent Journal (Journal), publishes a daily newspaper of general circulation in Marin County, California. In January 1970, San Francisco Typographical Union Local 21 (Local 21) commenced picketing the Journal's San Rafael, California, publishing plant (Pet. App. ii–iii). On February 11, 1970, the Regional Director of the National Labor Relations Board (respondent herein), pursuant to a charge filed by the Journal, petitioned the district court under Sectiion 10(*l*) of the National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 15, *et seq.*), for a temporary injunction against Local 21 and Locals 85 and 287 of the Teamsters (Locals 85 and 287). The petition alleged that there was reasonable cause to believe that the named unions were engaging in secondary boycott activity prohibited by Section 8(b)(4)(B) of the Act, principally by picketing to induce employees of various neutral employers at the Port of San Francisco to refuse to work, with an object of preventing and interfering with the delivery of newsprint to the Journal (Pet. App. iii).

On the same date, February 11, the district court issued a temporary restraining order and order to show cause, and, on February 13, following a hearing,

a temporary injunction. Pending a final disposition by the Board, the court (A. 6–9) enjoined the named unions, "their officers, representatives, agents, servants, employees, attorneys, and all members, persons and other labor organizations acting in concert or participation with them or any of them," from, *inter alia*:

> Engaging In, or by picketing, orders, directions, solicitation, requests or appeals, however given, made or imparted, or by any like or related acts or conduct, * * * Inducing Or Encouraging any individual employed by Star Terminal Co., Inc., Garden City Transportation Co., Ltd., Globe-Wally's Fork Lift Service, Inc. (herein called Star, Garden City, and Globe), or by any motor carrier, lift truck service company or other person engaged in commerce or in an industry affecting commerce To Engage In, a strike, slowdown or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities, or to perform any service; or sanctioning, supporting or promoting any such strike or refusal; or in any such or similar manner or by any other means * * * Threatening, Coercing Or Restraining said employers, or any other person engaged in commerce or in an industry affecting commerce,—where in either case An Object Thereof is: (1) to force or require Powell River-Alberni Sales Limited (herein called Powell), or any other person, to cease doing business with Journal; or (2) to force or require Star, Garden City, or any other person to cease doing business with Powell, or to force or require Globe or any other person to cease

doing business with Garden City, in order to compel Powell to cease doing business with Journal.

On April 28, 1970, the Regional Director filed in the district court a second petition for an injunction against Local 21. This petition, based on charges filed by the Journal and the Emporium-Capwell Corporation, alleged that Local 21 was further violating Section 8(b)(4)(B) of the Act by picketing and distributing handbills appealing to the public not to patronize various retail stores because they were advertising in the Journal (Pet. App. iv). On the same date, Local 21 consented to the entry of an order pending the final disposition by the Board (A. 10–13), enjoining "Local 21 * * * and all members, persons and labor organizations acting in concert or participation with it," from engaging in the charged unlawful conduct at the picketed stores or at the premises of other stores advertising in the Journal, or from:

> Threatening, coercing or restraining [the named firms] or any other firm advertising in The Independent Journal newspaper, by consumer picketing or by any like or related acts or conduct, where an object thereof is to force or require the said advertisers to cease advertising in The Independent-Journal newspaper or to cease doing business with [the Journal].

B. THE CONTEMPT PROCEEDINGS IN THE DISTRICT COURT

Despite these injunctions and an order, issued on June 24, 1970, holding Local 21 and certain of its officers in civil contempt of the April 28 injunction,[4]

[4] That adjudication (except as to two officials not involved here) and the Board's subsequent decision in the unfair labor practice case, finding that Local 21 had violated Section 8(b)(4)(B) of the Act by its picketing before and after the issu-

"the tempo of illegal activities in violation of both injunctions increased, with other locals participating" (Pet. App. iv). The new participants "included * * * Teamsters No. 70 and James R. Muniz, its president" (Pet. App. iv–v). As the court of appeals later described the activities (Pet. App. v): "The effort broadened to boycott or quarantine San Rafael and all of Marin County, curtailing deliveries of all supplies, causing traffic tie-ups and attempting to prevent delivery trucks from entering exit ramps from main highways to enter the city."

Accordingly, on October 19, 1970, the Regional Director filed with the district court a petition to adjudge Local 21 and certain other labor organizations and their officials, including petitioners, Teamsters Local 70 and its president, James Muniz, in civil and criminal contempt for failure to obey the February 13 and April 28 injunctions. The petition charged that the named unions and their officers, acting in furtherance of a joint venture, had committed at least 28 violations of the injunctions (A. 14–36).

The district court ordered the named defendants, including petitioners, to show cause why they should not be adjudged in civil and criminal contempt (A. 39–42).[5] Subsequently the court heard argument on a motion by the defendants for a jury trial in the crim-

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ance of the April 28 injunction (*San Francisco Typographical Union No. 21* (*California Newspapers, Inc. and Emporium-Capwell Corp.*), 188 NLRB 673) were affirmed by the court of appeals, 465 F. 2d 53 (C.A. 9).

[5] Four Board attorneys appearing for the Regional Director were appointed by the district court as counsel to prosecute the criminal contempt proceeding (A. 37–39).

inal contempt proceeding (A. 54–55). The court denied the motion (A. 55–56).

Testimony was taken by the district court for 17 days, between November 3 and December 15, 1970. On December 28, the court found certain of the defendants, including petitioners, guilty of criminal contempt of the February 13 and April 28 injunctions.[6] The court's Order and Adjudication in Criminal Contempt (Resp. App. C, 23a–25a) and its formal Findings and Conclusions (Resp. App. D, 26a–40a) were entered the next day, December 24.[7]

The district court found that all of the defendants, including petitioners, "[o]n or about, or prior to, October 7, 1970 * * * embarked upon a joint plan, program and campaign to create a boycott of goods, materials, commodities and services destined to, consigned to, or utilized by firms advertising in the Journal or to firms doing business with the Journal" (Resp. App. D, 31a). The court found that the defendants, including petitioners, "[i]n furtherance and support of their aforesaid joint plan, program and campaign," engaged in at least 26 acts of picketing, oral inducement of work stoppages, threats, and

[6] One union (Longshoremen's Local 10) and one individual (DeMartini) were not adjudged in criminal contempt because the proof did not establish the requisite degree of willfulness on their part (Resp. App. C, 23a, 24a–25a). Neither is involved in the case before this Court.

[7] The district court's Order and Adjudication in Civil Contempt (Resp. App. A, 1a–6a) issued the same day, and its Findings of Fact and Conclusions of Law Re: Civil Contempt Proceedings (Resp. App. B, 7a–22a) issued on January 28, 1971. The civil contempt findings are not at issue here.

harassment (*id.* at 31a–37a), of which the following is typical (*id.* at 33a):

> 8. On or about October 12, 1970, respondents, by their pickets and agents, by picketing and by other means, induced and encouraged drivers of Lucky not to perform services at the Lucky store located at 720 Center Street, Fairfax, California, and as a consequence prevented regular drivers from performing their duties for Lucky.

The defendants, including petitioners, caused traffic tie-ups in San Rafael (*id.* at 34a):

> 14. On or about October 13, 1970, respondents picketed three corners of the Highway 101 off-ramp to San Rafael, California, at Mission and Heatherton Streets, carrying signs the legend on some of which read: "Unfair To Teamsters—Scabs Must Go." By such picketing, and other conduct, respondents obstructed traffic entering San Rafael while inducing and encouraging truck drivers not to perform services for, make deliveries to, or pickups from retail stores located in San Rafael.

The court noted particularly petitioner Muniz' involvement in one act of harassment (*id.* at 32a):

> 3. Also on or about October 8, 1970, respondents, by their agents, including Respondent Richardson and Respondent Muniz, harassed the driver of a truck of Garden City Transportation Co., Ltd. (herein called Garden City) on its return trip to Garden City's premises after making delivery of newsprint to the Journal, and picketed the premises of Garden City and its truck with signs, the legend on some of

which read: "Teamsters on Strike—Scabs Must Go." As a consequence of such picketing, drivers of Garden City engaged in work stoppages and refusals to perform services for their employer. In addition respondents threatened Garden City with the shutdown of its operations on October 9, 1970.

The court found that by such acts and conduct the defendants, including petitioners, encouraged employees of retail stores and other picketed firms to engage in work stoppages, with the object of forcing the firms "to cease placing advertisements in or to otherwise cease doing business with each other or with the Journal" (*id.* at 37a–39a). The court concluded that by such acts and conduct certain of the defendants, including petitioners, were "in criminal contempt of this Court by reason of their wilful disobedience of and resistance to, and their wilful failure and refusal to comply with" the two injunctions (Resp. App. C, 24a–25a; see also Resp. App. D, 39a–40a).

Pursuant to the district court's request (A. 57), counsel for the Regional Director filed with the court a "Presentence Report and Recommendations", listing previous injunctions issued under Section 10 (*l*) of the Act against the various defendants, data on the financial conditions of the unions, and the dollar amount of damages suffered by five of the twenty-six affected business establishments as a result of defendants' illegal conduct (A. 43–47). The data on the financial conditions of the unions came from the most recent reports filed by them with the Department of Labor ("Labor Organization Annual Report, Form LM–2"), which reports were provided the district

court (A. 48–52). Petitioner Local 70's LM–2 showed that, in 1969, it took in a total of $1,013,742 in dues from its members (A. 49). At the end of 1969, its total assets amounted to $895,627, of which $95,534 was listed as "cash in banks" (A. 49). Local 70 filed no documents with the district court respecting its then current financial status.

The district court ordered each of the unions adjudged in criminal contempt, including petitioner Local 70, to pay a fine of $25,000, subject to the qualification that payment of $15,000 of the amount would be suspended for one year and remitted to the union upon the court's determination that the union had not further violated the injunctions (Resp. App. E, 41a–45a). The individuals adjudged in criminal contempt, including petitioner Muniz, were placed on probation for one year, with the condition that, if they engaged in further violations of the injunctions, they would be subject to imprisonment for a term not exceeding six months (Resp. App. E, 45a –46a).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals affirmed the judgments of civil and criminal contempt (Pet. App. vi). The court rejected the contention that 18 U.S.C. 3692 (n. 3, *supra*) requires a jury trial in criminal contempt cases arising out of violations of injunctions issued pursuant to Section 10(*l*) of the National Labor Relations Act. The court held that Section 3692 represents merely a recodification of Section 11 of the Norris-LaGuardia Act, 47 Stat. 72, 29 U.S.C. (1946 ed.) 111 (*infra*, p. 18), and, as such, restricts only the powers

of courts in contempt proceedings arising directly out of labor disputes between private employers and unions; it does not apply to contempts of orders issued pursuant to "the administrative scheme" of the National Labor Relations Act (Pet. App. ix–x).

The court of appeals also rejected the contention that a jury trial was constitutionally required because fines exceeding $500 had been imposed on the unions (Pet. App. x–xii). Noting that the decisions of this Court appeared to require a jury trial when the penalty imposed in criminal contempt was "serious," rather than "petty," the Court said (Pet. App. xiv–xv):

> In this plethora of discussion establishing and reexamining rules as to when a jury trial is required, there is hardly a word spoken about the line at which the measure in dollars of a fine causes the contempt to cease being "petty" and to become "serious". Certainly we cannot understand *Cheff* [*v. Schnackenberg,* 384 U.S. 373] as holding that the sum of $500 constitutes that line simply because it uses 18 U.S.C. § 1(3) to express a point of division between permissible and impermissible terms of imprisonment at which a jury is required. A deprivation of his liberty for a period of more than six months could certainly be serious to any individual, whereas a fine of $500 to a large corporation or to a large union might have no deterrent or punitive effect at all [footnotes omitted].[8]

[8] The court addressed itself again to 18 U.S.C. 1(3) in a subsequent footnote (Pet. App. xvi, n. 9):

"The six month-$500 provision of 18 U.S.C. § 1(3) defining the limits of 'petty' offenses became law in 1930. Act of Dec. 16, 1930, ch. 15, 46 Stat. 1029. While the value of personal free-

Turning to the facts of this case, the court held that the fines imposed on the unions for criminal contempt were not so serious as to be constitutionally prohibited absent a jury trial (Pet. App. xvi).

SUMMARY OF ARGUMENT

I

In 1947, the 80th Congress added Section 10(*l*) to the National Labor Relations Act, providing an interlocutory injunctive remedy to be invoked when a regional officer of the Board has reason to believe that a union has engaged in secondary boycott activity prohibited by Section 8(b)(4) of the Act. Under Section 10(*l*), a district court, upon appropriate petition by the Board's representative, is free to grant a temporary injunction "notwithstanding any other provision of law." This clause, coupled with the express terms of Section 10(h) of the Act, makes it clear that the district court's jurisdiction in granting such injunctive relief is not restricted by the provisions of the Norris-LaGuardia Act, 47 Stat. 70, as amended, 29 U.S.C. 101–115, including the provision of that Act (Section 11, 29 U.S.C. (1946 ed.) 111) requiring jury trials of contempts of injunctions "arising under this [the Norris-LaGuardia] Act." *United States* v. *United Mine Workers,* 330 U.S. 258, 298. That this result was consciously intended by Congress is shown by the debate on a proposal, ultimately defeated, to allow private employers to seek injunctions against secondary

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dom has not depreciated in the intervening period the same cannot be said either of the value of the dollar or of the growth in dollars of the assets of large organizations."

boycotts but to preserve the right of jury trial for contempts of such injunctive orders.

In 1948, the same Congress that had enacted Section 10(*l*) of the National Labor Relations Act the preceding year transferred Section 11 of the Norris-LaGuardia Act, with certain minor changes, to Section 3692 of Title 18. This was done as part of a general recodification of federal laws related to crimes and criminal procedure, and there is no indication that Congress thereby intended to make any substantive changes which would make a jury trial available in contempt proceedings arising from injunctive orders issued pursuant to the National Labor Relations Act. The reviser's note to Section 3692 simply states that the provision is based on Section 11 of the Norris-LaGuardia Act.

Nor is a different conclusion required by the fact that, in transferring Section 11 to Title 18, Congress replaced the reference to "cases arising under this [the Norris-LaGuardia] Act" with the phrase "arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute." This new phrasing was necessary to orient the new provision to the kinds of cases which arose under the Norris-LaGuardia Act, for which "labor dispute" is the jurisdictional touchstone. The National Labor Relations Act, on the other hand, is a law which is principally concerned with preventing unfair labor practices. Hence, there is no reason to disturb the

virtually uniform conclusion of the federal courts, adhered to for more than twenty-five years since its enactment, that Section 3692 does not apply to contempt cases arising out of injunctions issued under the National Labor Relations Act.

II

As recently as 1958, in *Green* v. *United States,* 356 U.S. 165, 183, this Court, citing "a long and unbroken line of decisions", held "that criminal contempts are not subject to jury trial as a matter of constitutional right". While this Court subsequently held in *Bloom* v. *Illinois,* 391 U.S. 194, that a jury trial was required for a criminal contempt when a sentence of imprisonment for more than six months was imposed, we submit that the rationale of *Bloom* does not require a jury trial in criminal contempt proceedings against organizations which may not be imprisoned, but only fined. *Bloom* "recognized the potential for abuse in exercising the summary power to imprison for contempt" (391 U.S. at 202); obviously this concern is not implicated when the contemnor is a corporation or other impersonal organization. The Court has long recognized the importance of a court's summary contempt power. While it may be appropriate to compromise that power when it threatens to abuse the liberty interest, there is no need to do so when the only possible penalty is a fine. Bench trials are not inherently unfair, and the amount of any fine imposed is subject to judicial review.

Even if organizations are entitled to jury trials for "serious" (as opposed to "petty") contempts, the fine imposed here did not make the contempt serious. Petitioners' contention that no offense may be deemed "petty" where a fine exceeding $500 has been imposed is grounded on the definition of a petty offense in 18 U.S.C. 1(3)—*i.e.*, "[a]ny misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both." But the Court's holding that a prison sentence of more than six months makes a crime serious, thus requiring a jury trial under the Constitution, was not predicated solely on 18 U.S.C. 1(3), but rather was based on the "near-uniform judgment of the Nation" as expressed in the laws and practices of the federal government and the states. *Baldwin v. New York,* 399 U.S 66, 72–73. Moreover, there is need for a uniform rule insofar as imprisonment is concerned, for, in a democracy, one person's liberty is equal to that of any other.

A survey of relevant state and federal laws and of other appropriate gauges of contemporary judgments reveals no such uniformity on the severity of a fine which may properly be imposed for a petty offense. On the contrary, such a survey reveals that a fixed amount such as that stated in 18 U.S.C. 1(3) is an inappropriate standard, especially when the defendant is a collective body like a corporation or a labor organization. A more apt expression of the national consensus would be a standard measuring the severity of a fine by such factors as the economic resources of the defendant and the amount of economic damage

flowing from the offense. Tested by such criteria, the fine of $10,000 imposed on the Union in the present case (apparently amounting to less than one dollar per member or other affiliated individual) cannot be said to have made the Union's contempt a serious offense for which the Constitution would require a jury trial.

ARGUMENT

I. 18 U.S.C. 3692 DOES NOT REQUIRE A JURY TRIAL IN CRIMINAL CONTEMPT PROCEEDINGS GROWING OUT OF VIOLATIONS OF INJUNCTIONS ISSUED UNDER THE NATIONAL LABOR RELATIONS ACT

In 1947 Congress enacted Section 10(*l*) of the National Labor Relations Act (161 Stat. 136, 149–150), authorizing the Board, and not private parties, to obtain from the federal district courts temporary relief against unfair labor practices free of the restrictions of the Norris-LaGuardia Act, 47 Stat. 70, including its requirement, in Section 11, of jury trials in contempt proceedings. Although that jury trial provision was repealed and replaced the next year by a substantially equivalent provision in 18 U.S.C. 3692, the injunctive proceedings provided for by Congress in the 1947 amendments to the National Labor Relations Act were unaffected. Elucidation of these points requires a brief examination of the pertinent portions of the legislative history of the Norris-LaGuardia Act, the National Labor Relations Act, and 18 U.S.C. 3692.

A. SECTION 11 OF THE NORRIS-LAGUARDIA ACT

In 1932, the Norris-LaGuardia Act was enacted, principally as a response to several decades of broad-

scale intervention by federal courts in labor controversies. Such intervention took the form of injunctions issued, often *ex parte,* and always without the guidance of any comprehensive legislative policy.[9] By thus intervening in private disputes between employers and employees without significant reference to any legislative policy defining precise evils against which the public was to be protected, judges were deciding cases largely on the basis of their economic sympathies.[10] To protect the labor movement against the destructive impact of such frequent and unrestricted use of injunctions, Congress severely limited the jurisdiction of the federal courts to issue injunctive orders "in a case involving or growing out of a labor dispute," broadened the definition of labor dispute so as to make clear that "the allowable area of union activity was not to be restricted * * * to an immediate

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[9] Thus, Representative Browning, a member of the House Committee on the Judiciary, which reported H.R. 5315, the bill introduced in the House by Representative LaGuardia, observed (75 Cong. Rec. 5470):

"The public policy laid down in the bill * * * is essential, because there should be some standard by which the courts may know, at a time when they are in such confusion, what it is proper to do. I think the most fitting and, in reality, the only proper tribunal to express such a policy is the Congress * * *."

See also S. Rep. No. 163, 72d Cong., 1st Sess. 18; Frankfurter and Greene, *The Labor Injunction* 15 (1930) ("Thus it is that the federal courts, under the Supreme Court's lead, have dealt with labor controversies apart from the authority of federal legislation and untrammelled by state decisions").

[10] Frankfurter and Greene, *The Labor Injunction, supra* at 26, citing Holmes, *Privilege, Malice, and Intent,* 8 Harv. L. Rev. 1, 8 (1930). See also *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770,* 398 U.S. 235, 250–251.

employer-employee relation" (*United States* v. *Hutcheson,* 312 U.S. 219, 231), and provided various procedural safeguards, including the jury trial provision in Section 11, which read (47 Stat. 72):

> In all cases arising under this Act in which a person shall be charged with contempt in a court of the United States (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed: *Provided,* That this right shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court.

The legislative history of Section 11 indicates that it was intended to apply to both civil and criminal contempts "arising under this Act." [11]

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[11] Section 11 of the Senate bill (S. 935), in the version adopted by the Senate prior to its submission to conference, provided for a jury trial in all cases of contempt of whatever nature, civil or criminal, without limitation to labor disputes. 75 Cong. Rec. 4757, 4761. See also S. Rep. No. 163, 72d Cong., 1st Sess. 1, 7, 23–25. Minority Views, 13–14; 75 Cong. Rec. 4510–4514, 4508–4509, 4621–4624, 4626, 4630, 5003–5005. The House bill (H.R. 5315), on the other hand, was limited to indirect criminal contempts arising out of labor disputes falling within the purview of that bill. 75 Cong. Rec. 5509. See also 75 Cong. Rec. 5469, 5471, 5472; H. Rep. No. 669, 72d Cong., 1st Sess. 10. In conference, a compromise between the House and Senate provisions was worked out. 75 Cong. Rec. 6335–6336, 6329. See also H. Conf. Rep. No. 821, 72d Cong., 1st Sess. 7; 75 Cong. Rec. 5550–5551. Explaining the conference

B. THE NATIONAL LABOR RELATIONS ACT

A more comprehensive set of protections for the activities of labor organizations was provided in the National Labor Relations Act of 1935 (the "Wagner Act"), 49 Stat. 449. Congress, *inter alia*, proscribed certain unfair labor practices on the part of employers, and established an administrative agency, the National Labor Relations Board, to determine whether such practices had been committed, and, if so, to provide an appropriate remedy. The Board's decision and order was subject to review in the courts of appeals, pursuant to Section 10 (e) or (f) of the Act, 29 U.S.C. 160 (e) or (f). Concluding that the protections of the Norris-LaGuardia Act were not needed in situations covered by the National Labor Relations Act, Congress further provided, in Section 10(h) of the latter Act, 29 U.S.C. 160(h), that, when "granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, * * * the jurisdiction of courts sitting in equity shall not be limited by * * * 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts

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agreement upon the floor of the Senate, Senator Norris stated that "section 11 now provides that anyone charged with contempt in any case arising under this act shall be entitled to a trial by jury." 75 Cong. Rec. 6450, 6453. Discussing the conference agreement upon the floor of the House, Representative LaGuardia agreed with Representative Dyer's explanation that "a jury trial is now in order for contempt, civil or criminal," adding, "That is, arising out of any action contemplated in the act." 75 Cong. Rec. 6337.

sitting in equity, and for other purposes', approved March 23, 1932 (U.S.C., Supp. VII, Title 29, Secs. 101–115)."

In the Labor-Management Relations Act of 1947 (the "Taft-Hartley Act"), 61 Stat. 136, Congress concluded that certain activities engaged in by unions, particularly secondary boycotts and jurisdictional strikes,[12] were injurious to the national interest, and proscribed them as unfair labor practices. See 29 U.S.C. 158(b). In Section 10(*l*), 29 U.S.C. 160(*l*), Congress required that, whenever the Board's regional official determines that there is reasonable cause to believe that a charge alleging a violation of Section 8(b)(4), 29 U.S.C. 158(b)(4), the secondary boycott provision,[13] is true and that a complaint should issue, he "shall" petition the appropriate federal district court "for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter."[14] Congress accorded the district courts jurisdiction to grant such relief "notwithstanding any other provision of law." 29 U.S.C. 160(*l*). The latter clause freed the district courts from the restrictions

[12] See, *e.g.*, II Legislative History of the Labor-Management Relations Act, 1947 (1948) (hereafter "Leg. Hist.") 1012–1013, 93 Cong. Rec. 3838 (remarks of Sen. Taft); II Leg. Hist. 1055–1056, 93 Cong. Rec. 4131–4132 (remarks of Sen. Ellender).

[13] In 1959, Congress included in Section 10(*l*) the newly added prohibitions against recognitional picketing (Section 8(b)(7), 29 U.S.C. 158(b)(7)) and "hot cargo" agreements (Section 8(e), 29 U.S.C. 158(e)). 73 Stat. 519, 543–545.

[14] A similar provision, Section 10(j), 29 U.S.C. 160(j), was also added, giving the Board discretionary authority to petition the district court for temporary injunctive relief in respect to other types of unfair labor practices.

of the Norris-LaGuardia Act in respect to such injunctions; Congress reinforced this result by retaining Section 10(h) of the Wagner Act.[15]

When some members of Congress argued that Section 10(*l*) should be rejected because it represented a repudiation of the Norris-LaGuardia Act,[16] the measure's supporters pointed out that injunctions sought by a Board representative in a limited class of cases were quite different from the kinds of injunctions which led to passage of the Norris-LaGuardia Act.[17] The injunctive remedy authorized in Section 10(*l*) is not to vindicate private rights in an economic dispute, but rather to protect the public against certain carefully defined types of unfair labor practices. Thus, the Senate Report, commenting on Section 10(*l*) and the companion provision, Section 10(j), states:

> Time is usually of the essence in these matters, and consequently the relatively slow procedure of Board hearing and order, followed many months later by an enforcing decree of the circuit court of appeals, falls short of achieving the desired objectives—the

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[15] See *Douds* v. *Local 294, Teamsters*, 75 F. Supp. 414, 418 (N.D. N.Y.); *Le Baron* v. *Printing Specialities, Local 388*, 75 F. Supp. 678, 681 (S.D. Cal.). See also *Bakery Sales Drivers Local Union 33* v. *Wagshal*, 333 U.S. 437, 442.

[16] See, *e.g.*, I Leg. Hist. 876, 93 Cong. Rec. 6296 (remarks of Rep. Javits); I Leg. Hist. 887, 83 Cong. Res. 6385 (remarks of Rep. Madden); II Leg. Hist. 1109–1113, 93 Cong. Rec. 4199–4202 (remarks of Sen. Pepper).

[17] See, *e.g.*, II Leg. Hist. 1364, 93 Cong Rec. 4843 (remarks of Sen. Smith); II Leg. Hist. 1544, 93 Cong. Rec. 6445–6446 (remarks of Sen. Taft).

> prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining. Hence we have provided that *the Board, acting in the public interest and not in vindication of purely private rights,* may seek injunctive relief in the case of all types of unfair labor practices and that it shall also seek such relief in the case of strikes and boycotts defined as unfair labor practices. [S. Rep. No. 105, 80th Cong., 1st Sess. 8; I Leg. Hist. 414; emphasis added.]

In sum, Section 10(*l*) did not permit the indiscriminate use of injunctions to influence the outcome of private labor disputes at the behest of private parties. Rather, it authorized the Board to seek temporary injunctive relief in a narrowly limited class of cases, and it made this part of an overall scheme dominated by "elaborate administrative machinery for dealing with the whole field of labor relationships, a matter requiring specialized skill and experience, and [provisions] for the handling of unfair labor practices by an administrative agency equipped for the task." *Amazon Cotton Mill Co.* v. *Textile Workers Union,* 167 F. 2d 183, 187 (C.A. 4). See also *Amalgamated Ass'n of Motor Coach Employees* v. *Dixie Motor Coach Corp.*, 170 F. 2d 902, 907 (C.A. 8).[18] Congress could thus dispense with Norris-LaGuardia Act pro-

[18] As an additional protective measure, Section 10(*l*) forbids the issuance of *ex parte* temporary restraining orders except on a showing that "substantial and irreparable injury to the charging party will be unavoidable," and provides that any such *ex parte* orders will expire after five days.

tections in Section 10(*l*) without bringing back the abuses which led to enactment of that law in 1932.

Petitioners contend (Br. 37–38; see also Brief of United Mine Workers ("Mine Workers") 8–10) that the foregoing merely shows that Congress intended to free district courts of the restrictions of the Norris-LaGuardia Act (*e.g.*, 29 U.S.C. 104) at the stage of issuing the injunction, but not from its jury trial provision, Section 11.[19] However, Section 11 of the Norris-LaGuardia Act, by its terms, is applicable only to "cases arising under this Act," and, where the issuance of the underlying injunction is not governed by the Norris-LaGuardia Act, a contempt of that injunction cannot be a case "arising" under that Act. Thus, in *United States* v. *United Mine Workers*, *supra*, 330 U.S. 258, decided in March 1947, shortly before § 10(*l*) was enacted, the Court, after holding that the Norris-LaGuardia Act was inapplicable to an injunction sought by the United States against strike action by a union and its officials in coal mines seized by the United States, further held that the defendants, in a trial for criminal and civil contempt of that injunction, were not entitled to a jury under Section 11 of the Norris-LaGuardia Act. The Court explained that "[Section] 11 is not operative here, for it applies

[19] But petitioners later concede (Br. 41) that, from "the effective date of Taft-Hartley in late summer, 1947, until June 28, 1948, the effective date of the new § 3692, an alleged contemnor of a Taft-Hartley injunction would probably have been denied the jury trial guaranteed by § 11 of Norris-LaGuardia, because the injunction would not have been one arising under Norris-LaGuardia itself."

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only to cases 'arising under this Act,' and we have already held that the restriction[s] upon injunctions imposed by the Act do not govern this case" (*id.* at 298, footnotes omitted).[20]

That Congress did indeed intend to free proceedings under Section 10(*l*) from the requirements of the Norris-LaGuardia Act not only at the injunction issuance stage, but also at the contempt stage, is confirmed by the debate over the Ball amendment. That proposal would have permitted private parties to seek federal court injunctions against jurisdictional strikes and secondary boycotts, but would have retained some of the Norris-LaGuardia Act protections, including the jury trial provision.[21] In pointing out the advantages

[20] Mine Workers (Br. 6, n. 5) attempt to distinguish *United Mine Workers*, *supra*, on the ground that there the Court held that the Norris-LaGuardia Act did not apply because the labor dispute was between the federal government and its employees, whereas Section 10(*l*) has merely freed the district courts of the restrictions of the Norris-LaGuardia Act in injunction suits brought by the Board. However, the Court's conclusion in *United Mine Workers* that Section 11 did not apply does not rest on any such distinction. Whatever the reason for the inapplicability, in both cases, since "the restriction[s] upon injunctions imposed by the Act do not govern this case," Section 11 "is not operative."

[21] The amendment was first proposed by a minority within the Senate Labor Committee in their supplemental statement to the Senate Report (I Leg. Hist. 461–462, S. Rep. No. 105, 80th Cong., 1st Sess. 55–56). It was then introduced in the Senate by Senator Ball on behalf of himself and three other Senators (II Leg. Hist. 1323–1324, 93 Cong. Rec. 4757). Although Senator Taft had signed the supplemental statement, he did not support the Ball amendment but rather introduced a substitute amendment, ultimately enacted as Section 303 of the Labor Management Relations Act, 29 U.S.C. 187. The latter provision

of his amendment over the provisions of Section 10(*l*) in the Committee bill, Senator Ball explained (II Leg. Hist. 1348, 93 Cong. Rec. 4834):

> * * * when the regional attorney of the NLRB seeks an injunction, the Norris-LaGuardia Act is completely suspended, as are section 6 and 20 of the Clayton Act. We do not go quite that far in our amendment. We simply provide that the Norris-LaGuardia Act shall not apply, with certain exceptions. We leave in effect the provisions of sections 11 and 12. Those are the sections which give an individual charged with contempt of court the right to a jury trial.

The Senate nevertheless rejected Senator Ball's proposed amendment, and Congress ultimately enacted Section 10(*l*), providing an injunctive remedy free from all Norris-LaGuardia Act restrictions.[22]

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permits private parties injured by unlawful boycotts or jurisdictional strikes to sue for damages. II Leg. Hist. 1399–1400, 93 Cong. Rec 4874–4875.

[22] As noted (*supra*, p. 21) Congress also carried over without change Section 10(h), which exempts Board proceedings generally from the Norris-LaGuardia Act. Section 10(h), by citing "secs. 101–115" of that Act, renders all of its provisions inapplicable. See H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 57, I Leg. Hist. 561. Contrary to petitioners' claim (Br. 29–35), the exemption in Section 10(h) is not limited to proceedings in the courts of appeals. Section 10(j) does not contain the language of exemption found in Section 10(*l*) ("notwithstanding any other provision of law"), yet proceedings under that section are exempt (by virtue of Section 10(h)) from the provisions of the Norris-LaGuardia Act to the same extent as proceedings under Section 10(*l*). *In re Union Nacional de Trabajadores*, 502 F. 2d 113 (C.A. 1).

1. In 1948, Section 11 of the Norris-LaGuardia Act was repealed, 62 Stat. 862, 866, and replaced by 18 U.S.C. 3692, 62 Stat. 844. This was done in the context of a revision of Title 18, U.S.C., entitled "Crimes and Criminal Procedure," in which some sections formerly in Title 18 were revised, and related federal laws in other titles were recodified in Title 18. Act of June 25, 1948, 62 Stat. 683. Some revisions consisted of minor changes in phrasing, while others were more substantive.[22a] Changes in laws effected by the 1948 recodification were thoroughly explained, as to both purpose and effect, in the series of "reviser's notes" printed in the House Report. See, *e.g.*, notes to 18 U.S.C. 1542–1545, 4202, H. Rep. 304, pp. A108, A187. The revisers were especially careful, where the coverage of a repealed provision was expanded, to explain why such a change was made. See, *e.g.*, note to 18 U.S.C. 4162, H. Rep. 304, p. A186. The reviser's note to 18 U.S.C. 3692, on the contrary, is quite brief and indicates no significant change in coverage. It states (H. Rep. 304, p. A176):

[22a] The House Committee on the Judiciary, which reported out the bill (H.R. 3190) that became Title 18 noted: "Revision, as distinguished from codification, meant the substitution of plain language for awkward terms, reconciliation of conflicting laws, omission of superseded sections, and consolidation of similar provisions." H. Rep. No. 304, 80th Cong., 1st Sess. 2 (hereafter "H. Rep. 304"). In specifically repealing Section 11 of the Norris-LaGuardia Act and certain other laws, Congress used a "method of specific repeal" which, as the House Committee explained, would "lift from the courts the onerous task of ferreting out implied repeals." *Id.* at 9.

Section 3692—Section Revised

Based on section 111 of title 29, U.S.C., 1940 ed., Labor (Mar. 23, 1932, ch. 90, § 11, 47 Stat. 72).

The phrase "or the District of Columbia arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute" was inserted and the reference to specific sections of the Norris-LaGuardia Act (sections 101–115 of title 29, U.S.C., 1940 ed.) were eliminated.

In this light, it is reasonable to conclude that, in enacting Section 3692 of Title 18, Congress intended to do no more than to place Section 11 of the Norris-LaGuardia Act in that title, along with other statutory provisions establishing procedures for contempt hearings.[23] And, for more than 25 years, this has been

[23] Thus, Section 3692 is preceded in Title 18 by Section 3691, which replaces Sections 21 and 24 of the Clayton Act, 38 Stat. 738, 739, which were specifically repealed, 62 Stat. 864. (Section 3691 provides for a jury trial in the narrow class of criminal contempt cases involving the wilful disobedience of an order by conduct which also constitutes a crime under federal or state law. See *Michaelson* v. *United States*, 266 U.S. 42.) Section 3692 is followed in Title 18 by Section 3693, which incorporates by reference Rule 42 of the Federal Rules of Criminal Procedure, governing the procedure to be followed in cases of criminal contempt, part of which relates to the disqualification of a judge to preside at a contempt hearing involving disrespect or criticism of him, a matter previously dealt with by Section 12 of the Norris-LaGuardia Act, which was also specifically repealed. 62 Stat. 866. See also Section 402 of Title 18.

the consistent conclusion of the courts which have considered the question. See *United States* v. *Robinson*, 449 F. 2d 925, 932 (C.A. 9); *Madden* v. *Grain Elevator, Flour and Feed Mill Workers*, 334 F. 2d 1014, 1020 (C.A. 7), certiorari denied, 379 U.S. 967; *Mitchell* v. *Barbee Lumber Co.*, 35 F.R.D. 544, 546 (S.D. Miss.). Thus, they have held that Section 3692 does not apply to contempt proceedings arising out of "injunctions provided for by or issued in aid of other federal statutes in the labor relations field * * *." *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor & Aroostook Railroad Co.*, 380 F. 2d 570, 580, n. 30 (C.A.D.C.) (Railway Labor Act). See also *In re Piccinini*, 35 F.R.D. 548, 551 (W.D. Pa.) (Fair Labor Standards Act). And, respecting the precise issue here, they have held that Section 3692 is inapplicable to contempt cases arising out of Section 10(*l*) injunction orders. *Madden* v. *Grain Elevator, Flour and Feed Mill Workers, supra; Schauffler* v. *Local 1291, International Longshoremen's Ass'n*, 189 F. Supp. 737, 742 (E.D. Pa.), reversed on other grounds, 292 F. 2d 182 (C.A. 3). See also *National Labor Relations Board* v. *Red Arrow Freight Lines*, 193 F. 2d 979, 980 (C.A. 5); *In Re Winn-Dixie Stores*, 386 F. 2d 309, 312, 316 (C.A. 5).

2. However, petitioners (Br. 38–40), adopting the view recently enunciated by the First Circuit in *In re Union Nacional de Trabajadores, supra*, 502 F. 2d 113,[24] contend that this long established construction of

[24] Although that case involved a criminal contempt of an injunction issued under Section 10(j) of the National Labor Relations Act, while the injunctions here were issued under Section

Section 3692 is erroneous because it fails to give effect to the plain language of that section. Petitioners note that, by its terms, Section 3692 is applicable "In *all* cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders *in any case* involving or growing out of a labor dispute" (emphasis added). The argument therefore runs that, since the contempt here arises under the National Labor Relations Act, a law "of the United States governing the issuance of injunctions or restraining orders," and since the case grew out of a "labor dispute", Section 3692 requires a jury trial.[25] The argument is unsound for several reasons.

a. The change in wording from the introductory clause of Section 11 of the Norris-LaGuardia Act[26] is best explained as simply a means of referring to the subject matter covered by the Norris-LaGuardia Act. When Section 11 was removed from that Act and inserted into Title 18, changes in phraseology were needed to relate it to the kinds of situations covered by the Norris-LaGuardia Act. The preamble to the Norris-LaGuardia Act, setting the theme of its succeeding provisions, recites (47 Stat. 70) "That no court of the United States * * * shall have jurisdiction

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10(*l*), the issue respecting the application of 18 U.S.C. 3692 is the same for both types of injunctions (see n. 22, *supra*).

[25] But petitioners concede (Br. 46) that, since Section 3692 is included in Title 18, "Crimes and Criminal Procedure," it is applicable only to criminal, and not civil, contempts. See also *In re Union Nacional de Trabajadores*, *supra*, 502 F. 2d at 119–120.

[26] The introductory clause of Section 11 of the Norris-LaGuardia Act read "In all cases arising under this Act * * *."

to issue any restraining order or temporary or permanent injunction in a case involving or gowing out of a labor dispute," except in the narrowly defined class of cases thereafter described. And Sections 4, 5, 7, 9, and 10 of the Norris-LaGuardia Act repetitively define their scope in terms of injunctive relief in a "case involving or growing out of any labor dispute". Thus the Norris-LaGuardia Act is pre-eminently a law "of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute." And the reference in Section 3692 of Title 18 to "cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute" can reasonably be construed, not as an enlargement of that provision, but merely as an effort to confine it to its Norris-LaGuardia Act jurisdictional touchstone.

b. Unlike the Norris-LaGuardia Act, the National Labor Relations Act is not essentially a law "governing the issuance of injunctions or restraining orders" in cases "involving or growing out of a labor dispute." It is concerned with preventing unfair labor practices, and the power conferred on the Board to obtain an injunction is merely incidental to achieving that objective.[27] While an unfair labor practice often

[27] Section 10(a) of the National Labor Relations Act, setting the theme of its succeeding provisions, empowers the Board "to prevent any person from engaging in any unfair labor practice * * * affecting commerce." Subsections (b), (c), (e), (f), (j), (k), and (*l*) of Section 10 thereafter repetitively define their scope in terms of an "unfair labor practice" in which

arises out of a labor dispute, the two are not coextensive; some conduct which constitutes a labor dispute may not constitute an unfair labor practice, and vice versa. See *National Labor Relations Board* v. *Mackay Radio Co.*, 304 U.S. 333, 344 ("The argument confuses a current labor dispute with an unfair labor practice defined in § 8 of the Act").[28] Moreover, when district courts act on petitions filed by the Board pursuant to Sections 10(j) or 10(*l*) of the Act, they are not engaging in the kind of *ad hoc* intervention in labor disputes which led to passage of the Norris-LaGuardia Act (see *supra*, pp. 16–17, 21–23).[29] Rather, they are acting within a framework established by Congress to prevent the commission of acts defined as unfair labor practices, without regard to whether those acts did or did not arise out of a labor dispute.[30]

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a person "has engaged" or is "engaging," and the place where it has "occurred" or is "alleged to have occurred."

[28] To be sure, the National Labor Relations Act incorporates, in Section 2(9), 29 U.S.C. 152(9), the same definition of a labor dispute which is embodied in the Norris-LaGuardia Act, 29 U.S.C. 113(c). However, Congress' purpose in doing so was not to regulate the dispute itself, but to insure that the Board would have full power to reach practices inimical to the public welfare which might emanate therefrom. See S. Rep. No. 573, 74th Cong., 1st Sess. 6–7.

[29] Cf. *Virginian Railway Co.* v. *System Federation No. 40*, 300 U.S. 515, 563.

[30] The Court of Appeals for the First Circuit attempted to "distinguish cases arising out of unfair labor practices from those arising under statutes [such as the Fair Labor Standards Act, 52 Stat. 1060, involved in *Barbee* and *Piccinini*, *supra*] vesting the government with authority to enforce compliance with more sharply defined federal standards which are not subject to bargaining" *In re Union Nacional de Trabajadores*, *supra*,

Accordingly, since the injunctions here were issued to check probable unfair labor practices, the contempt of those injunctions is more accurately viewed as arising out of unfair labor practices rather than a labor dispute.

c. At minimum, we submit, the foregoing analysis indicates that the "plain meaning" of 18 U.S.C. 3692—i.e., whether it encompasses contempts of injunctions issued under the National Labor Relations Act—is "sufficiently doubtful to warrant * * * resort to extrinsic aids to determine the intent of Congress, which, of course, is the controlling consideration * * *." *Cass* v. *United States*, 417 U.S. 72, 77. That Congress did not intend to expand Section 3692 of Title 18 beyond the scope of Section 11 of the Norris-LaGuardia Act is shown by the fact that, in the 1947 amendments to the National Labor Relations Act, the 80th Congress, after extensive consideration of the question, explicitly provided for the issuance of certain injunctions free of Norris-LaGuardia Act restrictions, including its jury trial provision (see *supra*, pp. 24–25), and the following year the same Congress transferred that jury trial provision, with the minor changes indicated (see *supra*, pp. 26–27), to Title 18 without indicating any intent to modify the scheme it had so laboriously worked out in the 1947 amendments.

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502 F. 2d at 118, n. 4; see also Pet. Br. 27–28). There is no warrant for such a distinction. Both types of statutes fall outside of Section 3692 because the injunctive power which they confer is utilized to further an express statutory policy, and not to resolve a private dispute between an employer and employees, or an employer and a labor organization.

3. There is no basis for petitioners' assumption (Br. 40–43) that Congress made Section 3692 applicable to all cases involving or growing out of a labor dispute to overrule this Court's holding in *United Mine Workers, supra,* that, since the Norris-LaGuardia Act did not bar issuance of the injunction, the jury trial provision of that Act was likewise inapplicable. The *United Mine Workers* case was decided on March 6, 1947. At that time the recodification of Title 18 was long underway, and the decision to transfer Section 11 to Title 18—in substantially the form finally enacted—had already been made. See H.R. 2200, 79th Cong., 1st Sess.;[31] H. Rep. 152, 79th Cong., 1st Sess., p. A164.

Moreover, Title 18 first passed the House on May 12, 1947 (93 Cong. Rec. 5049) and it did not finally pass both the Senate and the House until June 18, 1948 (94 Cong. Rec. 8721–8722, 8864–8865. There was thus ample opportunity for Congress, if it so desired, to indicate its disapproval of the *United Mine Workers* jury trial holding. Finally, since Title 18 was not enacted until more than one year after the Senate had rejected the Ball amendment which would have made Section 11 of the Norris-LaGuardia Act applicable to proceedings under the National Labor

[31] H.R. 2200 provided in pertinent part:

"In all cases of contempt in any court of the United States or the District of Columbia arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed. * * *"

Relations Act (*supra,* p. 25),[32] there was also ample opportunity for Congress, if it had desired to reverse that action (see *In re Union Nacional de Trabajadores, supra,* 502 F. 2d at 118–119; National Lawyers Guild ("Guild") Brief 15), to so indicate. Yet, neither in the House or Senate Reports on Title 18, nor in the legislative debates thereon, is there any intimation that Section 3692 was intended to overrule either *United Mine Workers* or the decision made in respect to the applicability of the Norris-LaGuardia Act to Board injunctions.[33] Congress' sole comment on Section 3692 consists of the brief reviser's note set forth, *supra,* p. 27.[34]

4. That Congress' change in wording, between Section 11 of the Norris-LaGuardia Act and Section 3692

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[32] The Ball amendment was rejected on May 9, 1947. II Leg. His. 1370, 93 Cong. Rec. 4847.

[33] The Senate Report, S. Rep. No. 1620, 80th Cong., 2d Sess., which was printed in June 1948, included some additional "Amendments and Explanations" reflecting, in part, "new legislation enacted since passage of the bill by the House" (*id.* at 2). But nothing is said about the injunction provisions of the Labor-Management Relations Act of 1947. (Note, however, the incorporation of "section 304 of the Labor-Management Relations Act, 1947, * * * prohibiting campaign contributions * * * by labor unions." *Id.* at 3.)

[34] The question of statutory interpretation in the present case differs significantly from that in *Tinder* v. *United States*, 345 U.S. 565, cited by the Guild (Br. 19, n. 18). In *Tinder*, this Court, construing a provision of the federal criminal code revised in 1948, was able to establish its meaning by reference to the reviser's note, since it fully explained the change made in the provision. 345 U.S. at 568–569, n. 2. (For a similar explanation of the *Tinder* holding, see the "Memorandum Re Tinder v. U.S." placed in the Congressional Record by Representative Celler in the course of the debate on the jury trial provision of the Civil Rights Act of 1957 (discussed *infra*), 103 Cong. Rec. 8684).

of Title 18, signifies no substantive change is confirmed by the debates on the jury trial provision of the Civil Rights Act of 1957 (Sec. 151, 71 Stat. 638, 42 U.S.C. 1995). At that time, Representative Celler, who had been chairman of the subcommittee of the House Committee on the Judiciary which had conducted hearings on the recodification of federal laws in Title 18,[35] put into the record a memorandum he described as "a complete and smothering answer" to the suggestion by Representative Smith that Section 3692 applied to proceedings under the National Labor Relations Act, as amended in 1947 (103 Cong. Rec. 8684–8687). That memorandum concluded that Congress did not, in Section 3692, restore the applicability of a jury trial provision to proceedings exempted from it by the same Congress just a year before (103 Cong. Rec. 8686–8687).[36]

II. A JURY TRIAL WAS NOT REQUIRED BY THE CONSTITUTION IN ORDER TO SUBJECT THE PETITIONER UNION TO THE FINE FOR CRIMINAL CONTEMPT IMPOSED IN THIS CASE.

A. JURY TRIALS ARE NOT CONSTITUTIONALLY REQUIRED IN CRIMINAL CONTEMPT PROCEEDINGS AGAINST UNIONS OR CORPORATIONS, WHICH CANNOT BE IMPRISONED.

Petitioner Local 70, but not petitioner Muniz, claims a constitutional right to a jury trial of the criminal contempt charge.[37] While the last decade has seen a

[35] See 92 Cong. Rec. 9122.

[36] See, also, 103 Cong. Rec. 8688–8691 (remarks of Rep. Keating); 103 Cong. Rec. 12842–12843 (letter from Attorney General Brownell).

[37] Since petitioner Muniz was placed on probation for one year, without being subject to a fine or imprisonment, he does

rapid development of the law regarding the right to jury trials of individual criminal contemnors who are subject to terms of imprisonment, none of these recent cases resolves the questions presented here. In this case the criminal contemnor is an unincorporated association which by its nature is not subject to imprisonment, but may only be fined. The questions are whether organizations subject merely to fines are ever entitled to jury trials in criminal contempt proceedings, and, if so, whether the fine imposed on Local 70 was such as to require a jury trial.

In our view neither Art. III, Section 2, of the Constitution nor the Sixth Amendment requires jury trials of criminal contempt proceedings where personal liberty is not at stake. Alternatively, we submit that the $10,000 fine imposed on petitioner Local 70 was not sufficiently serious to require a jury trial. Elaboration of these contentions requires a brief review of recent cases involving the right of natural persons to jury trial, particularly for criminal contempts.

As recently as 1958, in *Green* v. *United States,* 356 U.S. 165, 183, this Court, citing "a long and unbroken line of decisions," affirmed unequivocally that "criminal contempts are not subject to jury trial as a matter of constitutional right" (footnote omitted). While the Court noted that contempt proceedings have traditionally been surrounded with many of the protections available in a criminal trial,[*] the Court concluded that

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not claim a jury trial as a matter of constitutional right. See *Frank* v. *United States*, 395 U.S. 147.

[*] The Court cited (356 U.S. at 184, n. 15):

"*Cooke* v. *United States*, 267 U.S. 517, 537 (compulsory process and assistance of counsel); *Gompers* v. *United States*, 233

such contempts "are neither 'crimes' nor 'criminal prosecutions' for the purpose of jury trial within the meaning of Art. III, § 2, and the Sixth Amendment" 356 U.S. at 184–185 (footnote omitted). But *Green* was not to remain the law for long and, even at that time, was questioned in a dissent by Mr. Justice Black (356 U.S. at 193) striking the note of concern that ultimately was to persuade a majority of the Court: the risk of abuse in permitting a judge to be the "judge of his own cause" where the personal liberty of the alleged contemnor is at stake. Thus, for the dissenters in *Green,* it was the possibility of "unconditional imprisonment" which brought the jury trial provisions of the Constitution into play. Distinguishing imprisonment for civil contempts, "where the defendant carries the keys to freedom," Justice Black wrote (356 U.S. 197–198):

> In my judgment the distinction between conditional confinement to compel future performance and unconditional imprisonment designed to punish past transgressions is crucial, analytically, as well as historically, in determining the permissible mode of trial under the Constitution.

Similarly, he observed (356 U.S. at 209) that "[a] great concern for protecting individual liberty from even the possibility of irresponsible official action was one of the momentous forces which led to the Bill of Rights."

U.S. 604, 611–612 (benefit of a statute of limitations generally governing crimes); *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 444 (proof of guilt beyond a reasonable doubt and freedom from compulsion to testify)."

The rule that "criminal contempts are not subject to jury trial as a matter of constitutional right" was reaffirmed in 1964 in *United States* v. *Barnett,* 376 U.S. 681, 692. There, however, the Court added the *dictum* that "[s]ome members of the Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses" (376 U.S. at 695, n. 12). In invoking the concept of petty offenses, the Court brought to bear on the criminal contempt question a separate line of cases dealing with the right to jury trial of crimes generally. This area too had been characterized by a continuing concern over serious interferences with personal liberty without the protection of a jury. In *Callan* v. *Wilson,* 127 U.S. 540, 549, the Court rejected the notion that the jury trial guarantee might apply only to felonies, ruling instead that "[i]t embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen."

Thus the debate concerning the proper characterization of criminal contempt, as well as the proper categorization of offenses generally, for the purpose of the jury trial guarantees was informed by a single overriding concern: the risk of arbitrary deprivation of personal liberty. It is not surprising, then, that the Court dealt decisively with both issues on the same day. In *Duncan* v. *Louisiana,* 391 U.S. 145, the Court held that the due process clause of the Fourteenth Amendment extended to the states the Sixth Amend-

ment's right to jury trial of "serious" offenses, and that a crime for which the legislature had authorized a maximum penalty of two years' imprisonment was "serious". Applying this holding in *Bloom* v. *Illinois,* 391 U.S. 194, decided the same day as *Duncan,* the Court held that a jury trial was constitutionally required for a criminal contempt that resulted in a sentence of two years' imprisonment.

Both cases again expressed the abiding concern over arbitrary interference with personal liberty. Thus *Duncan* (391 U. S. at 156) spoke of "a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges," while *Bloom* (391 U.S. at 202) "recognized the potential for abuse in exercising the summary power to imprison for contempt—it is an 'arbitrary' power which is 'liable to abuse' *Ex parte Terry,* 128 U.S. 289, 313 (1888)."

While the two lines of authority which came together in *Duncan* and *Bloom* may thus dictate similar results for contempt and other crimes when the liberty interest is at stake, it does not follow that the results should be the same when that interest is not implicated. Contempt has historically been considered *"sui generis"* (*Cheff* v. *Schnackenburg,* 384 U.S. 373, 380). Over the years contempt has been "surrounded with many of the protections available in a criminal trial" (*Green* v. *United States, supra,* 356 U.S. at 184), now including the jury trial protection where serious interferences with personal liberty are threatened (*Bloom, supra*). Yet criminal contempt is

still recognized as an offense having "unique" aspects (*Duncan, supra*, 391 U.S. at 162, n. 35). We submit that neither history nor policy requires jury trials of criminal contempts by associations or corporations which, by their nature, may not be imprisoned, but only fined.

The power of the courts to deal summarily with contempts was acknowledged by this Court for 150 years. At the time *Green* was decided, in 1958, Mr. Justice Frankfurter was able to "call the roll" of "every Justice who sat on the Courts since 1874" (with two exceptions) as supporting this power (356 U.S. at 192 and 192, n. 3, Frankfurter, J., concurring). The basis of this power has been articulated in the numerous cases cited in *Green* (356 U.S. at 183, n. 14) and discussed in *Barnett* (376 U.S. at 694–699); it was perhaps most succinctly stated by Mr. Justice Brewer in *In re Debs* (158 U.S. 564, 594–595):

> [T]he power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency.

It may be appropriate to sacrifice "half [the] * * * efficiency" of the contempt power when it threatens to become an arbitrary interference with the liberty

interest. But when the contemnor is an artificial entity or association—which may not be imprisoned—there is no need further to compromise this historic power.

The jury is not a crucially important safeguard when the criminal contemnor is an artificial entity not subject to imprisonment. Manifestly it has no "peers" which can sit in judgment upon it. See *Duncan, supra,* 391 U.S. at 156. And a bench trial of such a cause obviously is not inherently unfair, since it is constitutionally adequate in "petty" contempt proceedings against individuals. Indeed, when this Court ruled that counsel must be provided whenever *any* term of imprisonment was imposed, it distinguished the cases permitting non-jury trials where the potential punishment was imprisonment for six months or less, noting that "the right to trial by jury has a different genealogy and is brigaded with a system of trial to a judge alone." *Argersinger* v. *Hamlin,* 407 U.S. 25, 29.[39] And, significantly, whatever the fine imposed, it is subject to appellate review. See, *e.g., United States* v. *United Mine Workers, supra,* 330 U.S. at 304–305.

Finally, this Court has long recognized the power of courts to impose fines—even substantial fines—upon unions and corporations without the interposition of a jury. Thus in *United States* v. *United Mine Work-*

[39] *Argersinger* again demonstrates the Court's fundamental concern with protecting against arbitrary interference with personal liberty. Even though uncounseled trials arguably present a greater risk of unfairness than summary (non-jury) trials, the Court expressly left open the possibility that uncounseled trials are nevertheless constitutionally permissible where the penalty is merely a fine. See 407 U.S. at 37, 40.

ers, supra, 330 U.S. at 304–305, the Court sustained the imposition, without a jury trial, of a fine of $700,000 against the union, to be increased to $3,500,000, unless it complied within five days with the outstanding injunction. Since that time on numerous occasions this Court has declined to review criminal contempt proceedings in which substantial fines were imposed.[40] Perhaps the most significant of these was the Court's refusal to review the $100,000 fine imposed on Holland Furnace Co. while undertaking to review the claim of its president, Cheff, that a jury was constitutionally required before he could be imprisoned for six months for contempt. See *Cheff* v. *Schnackenberg,* 384 U.S. 373, 375.[41]

For these reasons we submit that the right to trial by jury should not be extended to unincorporated associations and corporations in criminal contempt proceedings where the only possible penalty is a fine.

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[40] See *In re Local 825, Operating Engineers,* 57 LRRM 2143 (C.A. 3), certiorari denied, 379 U.S. 934 (union fined $15,000 and its business manager $5,000); *In re Holland Furnace Co.,* 341 F. 2d 548 (C.A. 7), certiorari denied, 381 U.S. 924 (company of which Cheff was president fined $100,000); *In re Jersey City Education Ass'n,* 115 N.J. Super. 42, 278 A. 2d 206, 213–215, certiorari denied, 404 U.S. 948 (union fined $10,000); *In re Fair Lawn Education Ass'n,* 63 N.J. 112, 305 A. 2d 72, certiorari denied, 414 U.S. 855 (union with 347 members fined $17,350). See also *Rankin* v. *Shanker,* 23 N.Y. 2d 111, 242 N.E. 2d 802, 807–808, stay denied, 393 U.S. 930 (union subject to fine of $10,000 per day).

[41] The corporation, however, did not explicitly raise the jury trial issue in its petition. See petition for a writ of certiorari, *Holland Furnace Co.* v. *Schnackenberg,* No. 972, O. T. 1965,

B. IN ANY EVENT THE FINE IMPOSED ON THE PETITIONER UNION WAS NOT SUCH AS TO MAKE THE CONTEMPT "SERIOUS"

1. The distinction between "petty" and "serious" offenses

We have seen that *Duncan* v. *Louisiana, supra,* interpreted the due process clause of the Fourteenth Amendment to extend to the states the Sixth Amendment right to jury trial for other than "petty" crimes. While *Bloom* v. *Illinois, supra,* held only that a contemnor sentenced to two years' imprisonment was entitled to a jury trial, the Court's discussion did not appear to treat criminal contempt differently than other crimes. Thus the Court stated (391 U.S. at 199–200), "The Constitution guarantees the right to jury trial in state court prosecutions for contempt just as it does for other crimes". While, in our view, this discussion in *Bloom,* which involved only a contempt proceeding against an individual, does not preclude our submission, *supra,* that juries are not required for contempt proceedings against organizations subject merely to a fine, we submit that, in any event, the $10,000 fine imposed here [42] was not so substantial as to make the contempt other than "petty".

[42] As Noted in the Statement (p. 10, *supra*), the district court imposed a fine of $25,000 on each union adjudged in criminal contempt, but $15,000 of this amount was suspended for one year and would be remitted upon the court's determination that the union had not further violated the injunctions within that period. In these circumstances, as petitioner Union apparently concedes (Br. 9, 17), the unconditional fine of $10,000 is the operative penalty. See *Shillitani* v. *United States*, 384 U.S. 364, 368–370, and cases there cited.

Petitioners argue that any fine of more than $500 makes a contempt "serious" for the purposes of the jury trial provisions, relying on 18 U.S.C. 1(3) which defines as "petty" an offense "the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both." Petitioners correctly note that the cases fixing the constitutional line between "petty" and "serious" crime at six months' imprisonment have cited 18 U.S.C. 1(3). *Cheff* v. *Schnackenberg, supra,* 384 U.S. at 379; *Duncan* v. *Louisiana, supra,* 391 U.S. at 161. But it is evident that the Court did not simply rely on this statute—which Congress could amend at any time—in determining what constituted a "serious" offense. Thus, in *Duncan* the Court based its conclusion that "a crime punishable by two years in prison" is serious, and not petty, "on past and contemporary standards in this country." *Duncan* v. *Louisiana, supra,* 391 U.S. at 162. The Court noted (*id.* at 161):

> In the federal system, petty offenses are defined as those punishable by no more than six months in prison and a $500 fine [citing 18 U.S.C. 1]. In 49 of the 50 States crimes subject to trial without a jury * * * are punishable by no more than one year in jail [footnote omitted]. Moreover, in the late 18th century in America crimes triable without a jury were for the most part punishable by no more than a six-month prison term * * *.

And in *Baldwin* v. *New York,* 399 U.S. 66, 69, 70–73, the Court concluded that "no offense can be deemed 'petty' for purposes of the right to trial by jury where

imprisonment for more than six months is authorized," because, "with a few exceptions, crimes triable without a jury in the American States since the late 18th century were also generally punishable by no more than a six-month prison term," and because the existing laws of the fifty states—the "near-uniform judgment of the Nation"—reflected the same view regarding when a term of imprisonment is so long that it may be imposed only if a jury trial is made available.

2. 18 U.S.C. 1(3) is an inadequate basis for determining whether a fine is "petty"

18 U.S.C. 1(3) was not addressed to the problem here; the relevant "gauges" of community judgments regarding what is a serious fine indicate that a more flexible standard is appropriate.

In 1930, Congress, in defining petty offense for purposes of the provision now codified as 18 U.S.C. 1, set the punishment limit at six months' imprisonment and/or a fine of $500 (46 Stat. 1029). In arriving at this figure, Congress intended mainly to unclog criminal calendars by eliminating the need for grand jury indictment for less serious offenses. See H. Rep. No. 1699, 71st Cong., 2d Sess. 3 ("H. Rep. 1699"). The bill became law over strenuous objections that, to the ordinary individual, six months' confinement and a fine of $500 are hardly petty, and that fines of $100 or less would be a more appropriate standard. 72 Cong. Rec. 9993; H. Rep. 1699, pt. 2. Nothing in the history of the provision suggests that Congress believed that a $500 fine would have a serious

impact on corporations or other collective bodies.[43] The amount of the fine was left unchanged in the 1948 recodification, and there was no reconsideration of the appropriateness of that amount. See H. Rep. 304, *supra;* 93 Cong. Rec. 5048–5049.

Numerous statutes provide for the imposition of civil penalties in excess of $500 through an administrative process which excludes jury trials. Thus, under a section of the Immigration and Nationality Act, 8 U.S.C. 1321, 66 Stat. 226, the Attorney General may impose a fine of $1,000 per violation on any person, owner, master, officer, or agent failing to comply with provisions relating to the unauthorized landing of aliens. Under the Marine Mammal Protection Act of 1972, 16 U.S.C. (Supp. II) 1375(a), 86 Stat. 1036, the Secretary of the Interior may assess a civil penalty of not more than $10,000 for each violation of Subchapter I of the Act. And, under the Occupational Safety and Health Act, 29 U.S.C. 651, 666(a), 84 Stat. 1590, 1606, an employer who has wilfully or repeatedly violated designated sections of the Act may be assessed a civil penalty of not more than $10,000 for each violation. Another subdivision of this section provides that any employer cited for a violation of the designated sections where the violation has been "specifically determined not to be of a serious nature, *may* be assessed

[43] Of course, Congress could not have been focusing on gradations of contempt since, until at least 1964, when this Court decided *United States* v. *Barnett*, *supra*, it was virtually unquestioned that contempt proceedings were *sui generis* and hence not classifiable as either crimes or civil wrongs. See *Green* v. *United States*, 356 U.S. 165.

a civil penalty of up to $1,000 for each such violation" (29 U.S.C. 666(c)), whereas an employer cited for a "serious violation * * * *shall* be assessed a civil penalty of up to $1,000 for each such violation" (29 U.S.C. 666(b)) (emphasis added). Although civil penalties differ from criminal sanctions by the degree of opprobrium they carry with them, they are nevertheless indicative of the severity of monetary penalties which Congress is willing to see imposed in proceedings which do not possess all of the traditional attributes of trials of serious criminal offenses.[44]

It is also relevant that, in some statutes, Congress has increased penalties—both civil and criminal—as the impact of the original penalties has weakened as a result of inflation and the growth of the regulated business entities. For example, violations of the fuel additives provisions of the Air Quality Act of 1967, 42 U.S.C. 1857f–6c, 81 Stat. 502, were originally punishable by a civil penalty of $1,000 for each violation, but the penalty was raised in the Clean Air Act Amendments of 1970, 84 Stat. 1700, to $10,000 for each viola-

[44] None of the foregoing statutory provisions places any ceiling on the total amount in penalties which can be imposed for more than one violation. Moreover, under one of the criminal provisions of the Occupational Safety and Health Act, 29 U.S.C. 666(a) (under which violations would be prosecuted in court), a willful violation of designated standards, rules, orders, or regulations, where the violation is shown to have caused the death of an employee, is punishable by a fine of not more than $10,000 or by imprisonment of not more than six months (29 U.S.C. 666(e)). This certainly suggests that six months' imprisonment and a $500 fine are not a fixed or inevitable legislative equation.

tion. Similarly, fines for criminal violations of the Sherman Act, 15 U.S.C. 1, *et seq.*, 26 Stat. 209, were raised from $5,000 to $50,000 in 1955 (69 Stat. 282), and, in 1974, from $50,000 to $1,000,000 for a corporation and $100,000 for "any other person" (Antitrust Procedures and Penalties Act, Pub. L. No. 93–528, Section 3, 88 Stat. 1708.[45]

The most recent changes in the Sherman Act also reflect a disposition on the part of Congress to treat collective bodies such as corporations or organizations differently from natural persons where fines are concerned. The same attitude can be seen in state statutes and case law. Thus, for example, Illinois has created a special class of offenses designated "business offense[s]," which are not subject to limitations set in the general schedule of authorized fines, but rather are punishable by whatever fine the legislature sets in the statute defining the particular business offense. Ill. Ann. Stat. ch. 38 § 1005–9–1(5) (Smith-Hurd, 1973). The annotator's comment on this section indicates that this exception to the fine schedule is made because imprisonment is generally not a possible punishment for these offenses. Despite the absence of any general limitation on fines, a business offense is defined as "a *petty offense* for which the fine is in excess of $500." *Id.* § 1005–1–2 (emphasis added).[46]

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[45] In this same section of the 1974 amendment, these violations were raised from misdemeanors to felonies.

[46] See also N.Y. Penal Law § 80.10 (McKinney, 1967), setting out a special schedule of fines for corporations. In this schedule, unlawful conduct constituting a Class B misdemeanor, for which a natural person could be imprisoned for no more than

The logic of this distinction between corporations and natural persons applies also to labor organizations. In both cases, since the fine is in reality borne by a number of persons—whether stockholders or members—it is reasonable to measure its "seriousness" according to a different scale than might be appropriate for an individual offender. Thus, in some recent state cases involving criminal contempts by labor organizations, the courts have placed the fines imposed in perspective by explaining their impact on individual members. See *In Re Fair Lawn Education Association,* 63 N.J. 112, 305 A. 2d 72, 78, certiorari denied, 414 U.S. 855 (fine of $17,350 levied against teachers' union described as "$50 per member"); *Rankin* v. *Shanker,* 23 N.Y. 2d 111, 120, 242 N.E. 2d 802, 808, stay denied, 393 U.S. 930 (fine of $10,000 per day or 1/52 of annual membership dues, whichever is the lesser, to which union was potentially subject, described as "actually small, amounting, at most, to no more than a member's weekly union dues for each day of the contempt").

The foregoing discussion demonstrates, we submit, that the definition of a petty offense in 18 U.S.C. 1(3) cannot be taken as the expression of a national consensus on what constitutes a "serious" fine in any criminal case, including criminal contempts—and cer-

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three months, is punishable by a fine of not more than $2,000. Alternatively, for any gradation of offense, a higher fine not exceeding double the gain from commission of the offense may be imposed. This section also states that fines, many of them higher, specified in other titles of New York law are not subject to the schedule.

tainly not when the impact of the fine is dispersed among a large number of individual shareholders or members of the entity fined. Congress and the states have taken a flexible approach toward determining amounts of fines for given offenses, since the resources of offenders and changes in economic conditions all affect the impact that such fines will have. Nowhere is this approach more apparent than in the *Final Report of the National Commission on Reform of Federal Criminal Laws* (hereafter "Report"), containing a proposed new federal criminal code which would replace most of Title 18 and comments on the proposed new provisions.[47] The Commission would classify criminal contempt as a "Class B misdemeanor," punishable in the case of individuals by imprisonment for no more than six months (Report, p. 120, § 1341(2)).[48] That the Commission's intent is to avoid jury trials in criminal contempt cases is shown by the Comment, which states: "A six-month prison term, held by the Supreme Court to be the maximum which can be imposed without a jury trial, is set as the maximum for all cases" (Report, p. 121). The

[47] The Report is printed in *Hearings on Reform of the Federal Criminal Laws before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 92d Cong., 1st Sess., pt. 1, at 129, *et seq.* (1971). The Report supersedes the Commission's study draft cited by petitioners (Br. 19, n. 19).

[48] This limitation on punishment is expressly set forth in the section on "Criminal Contempt and Related Offenses"; it thus supersedes the 30-day limitation on imprisonment for Class B misdemeanors set forth in the schedule of authorized terms of imprisonment, contained in a different section of the proposed code (Report, p. 284, § 3201(1)).

criminal contempt section also provides that, "if the criminal contempt is disobedience of or resistance to a court's lawful temporary restraining order or preliminary or final injunction or other final order, other than for the payment of money, the defendant may be sentenced to pay a fine in any amount deemed just by the court" (Report, p. 120, § 1341(2)).

Although the existence of the special fine provision for criminal contempt makes the general section on "Authorized Fines" (Report, p. 295, § 3301) inapplicable, it is nevertheless useful to look at that section to see what the Commission regarded as appropriate sanctions for petty offenses generally. According to the schedule in the section, the authorized maximum fine for a Class B misdemeanor would be $500 or, in certain cases, a fine imposed under an alternative provision, as follows:

> (2) Alternative Measure. In lieu of a fine imposed under subsection (1), a person who has been convicted of an offense through which he derived pecuniary gain or by which he caused personal injury or property damage or loss may be sentenced to a fine which does not exceed twice the gain so derived or twice the loss caused to the victim. [Report, p. 295, § 3301(2)].[49]

[49] Cf. A.B.A. Special Committee on Minimum Standards for Criminal Justice, *Standards Relating to Sentencing Alternatives and Procedures* (Approved Draft, 1968) p. 118, § 2.7(f), and Commentary, pp. 127–129 (recommending use of a "flexible index" rather than a fixed dollar amount in certain classes of offenses; *e.g.*, "fine relative to sales, profits, or net annual income might be appropriate" in cases "such as business or antitrust offenses, in order to assure a reasonably even impact of the fine on defendants of variant means").

The Comment on this section notes that, "[b]ecause the number of sanctions which can be used against a convicted organization is limited, it might be desirable to set a separate and higher fine limit for such offenders, for use when subsection (2) is unsatisfactory" (Report, p. 295).[50] The Commission also proposes that, in determining the amount of any fine, a court should take into consideration "the burden that payment will impose in view of the financial resources of the defendant" (Report, p. 295, § 3302(1)). In sum, the $500 authorized maximum fine for Class B misdemeanors—which, measured by the maximum term of imprisonment, are clearly petty offenses—would not be mechanically applied in every case without regard for the economic resources of the defendant or the amount of economic damage flowing from his offense.

3. The fine imposed on the union in the present case was not so serious as to require a jury trial

In light of the foregoing evidence that current standards for setting monetary penalties are generally flexible with regard to petty offenses, a fixed sum, such as the $500 maximum in 18 U.S.C. 1(3), should not be adopted as the constitutional dividing line between petty and serious offenses. Rather, the severity of the fine should be measured by such factors as the economic resources of the defendant and the amount of economic damage flowing from his offense. At the

[50] Cf. *Standards Relating to Sentencing Alternatives and Procedures*, *supra*, p. 118, § 2.7(g), and p. 129 (recommending consideration of special schedule of fines for offenses committed by corporations).

least, we submit, this approach should be used when the fine is imposed on an artificial entity or association so that its impact is, realistically, divided among a number of individuals. Cf. *United Steelworkers* v. *R. H. Bouligny, Inc.*, 382 U.S. 145.

Tested by these criteria, the fine imposed on the Union in the present case cannot be said to have made the Union's contempt a serious offense, for which the Constitution would require a jury trial. Although $10,000 might represent a serious penalty to an individual with limited resources, it is bound to have a significantly weaker impact on a large organization with substantial financial resources, such as Local 70 [51]—and its impact on the individual members of Local 70 (and other persons who pay fees to it), who are the only natural persons affected, is hardly substantial. Indeed, in 1969 approximately 13,000 persons were either dues-paying members of, or non-members required to pay certain fees to, Local 70 [52]; thus the $10–

[51] See Statement, *supra*, pp. 9–10, regarding the Union's annual income from dues and its financial assets as of December 31, 1969. The Union was, of course, free to call to the district court's attention any significant changes in those figures, but, aside from vague references to a deterioration in the financial condition of Local 70 owing to unemployment (A. 66–67), it did not do so.

[52] This figure is derived as follows: Local 70's Form LM–2 shows that, in 1969, it paid a per capita tax of $233,331 to the International (A. 49, Item 52). Under the 1966 Constitution of the International Brotherhood of Teamsters (Art. X, Sec. 3(b)), in effect in 1969, each local union was required to pay the International a tax of $1.50 per month ($18 per year) for dues-paying members and "all persons paying agency shop fees, periodic service fees, and hiring hall fees to the Local Union." $233,331 divided by $18 yields a figure of just under 13,000 persons.

000 fine imposed in this case amounted to less than 80 cents per affected individual. Moreover, the fine was clearly in reasonable proportion to the amount of loss suffered by the firms which were victims of the repeated boycott activity in violation of the injunctions.[53]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 1975.

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[53] The Pre-sentence Report filed with the district court was accompanied by affidavits showing a total of $27,201.06 in damage claims by such firms, and it was noted that additional claims for damages were anticipated (A. 46).

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (49 Stat. 449, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> SEC. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike, or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> * * * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *. *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;
>
> * * * * *
>
> *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit

publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

* * * * *

SEC. 10. (h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U.S.C., Supp. VII, title 29, secs. 101–115).

* * * * *

(*l*) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a

complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: * * * Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. * * *

Relevant provisions of the Norris-LaGuardia Act, 47 Stat. 70, are as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.
>
> * * * * *
>
> SEC. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;
>
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
>
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute,

whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

* * * * *

SEC. 11. In all cases arising under this Act in which a person shall be charged with contempt in a court of the United States (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed: *Provided,* That this right shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court.

18 U.S.C. 3692, 62 Stat. 844, provides as follows:

In all cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed.

This section shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice nor to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders or process of the court.

18 U.S.C. 1(3), 62 Stat. 684, provides as follows:

Notwithstanding any Act of Congress to the contrary:

* * * * *

(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.

The relevant provisions of the United States Constitution are as follows:

Article III, § 2: "The Trial of all Crimes, except in Cases of Impeachment shall be by Jury. * * *"

* * * * *

Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. * * *"

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